Rep. Albers Testimony on AJR 30
To the Assembly Committee on Elections & Constitutional Law
March 22, 2007

Members of the Committee, I have introduced Assembly Joint Resolution 30 with the intention of kick-starting a very important debate about separation of powers and the powers of taxation as it pertains to the Wisconsin Supreme Court and the judicial branch of government.

AJR 30 is a proposed constitutional amendment that would prohibit the state Supreme Court from assessing a fee on attorneys licensed to practice law in Wisconsin for the purposes of funding indigent legal aid.

Currently, the assessment is $50 per attorney per year and is collected at the same time that annual mandatory bar assessments are made. The assessment is commonly known as WisTAF, named for the Wisconsin Trust Account Foundation which operates and administers the fund known as the Interest of Lawyer Trust Accounts to provide a source of funding for legal services to the poor. The mandatory assessment was ordered by the Supreme Court in March 2005 on a temporary basis, and it is expected that the Court will permanently extend the WisTAF assessment in the near future. In fact, a recent report by the Access to Justice Study Committee of the State Bar of Wisconsin specifically calls for making the WisTAF assessment permanent AND extending it to judges as well.

As this debate moves forward today and in the future I want to make one thing absolutely clear: I am in no way opposed to legal aid to the indigent or any other segment of our society. Access to competent legal counsel and equal access to the justice system are fundamental rights of every American. However, I believe that

Justice Prosser was correct when he said in his dissent to the Supreme Court order mandating this assessment that "a laudatory end does not justify an illegitimate means."

Clearly, the most glaring illegitimacy in this Supreme Court assessment is that it basically amounts to a tax. The Wisconsin Constitution gives the legislature the exclusive power to levy taxes. Although the legislature may delegate its taxing power to local governments and executive agencies, it does not do so to the judicial branch. Furthermore, this assessment is a tax because it goes beyond the cost of regulation and exists to raise revenue for a socially desirable program.

Another consideration for this committee is: if the Court believes that this assessment is proper and serves a legitimate purpose, what is to keep the Court from imposing even broader and larger assessments? This can only lead us down a steep and slippery slope, which Wisconsin, being a high tax state should altogether avoid.

The best, and perhaps only, way to stop this illegitimate tax by the judicial branch, and to prevent any court from imposing other taxes in the future, is to pass a constitutional amendment; for by restoring a bright line between the three branches of government, the power of the purse which belongs to the Legislature, shall be restored.

Let me conclude by saying that regardless of whether or not this amendment is approved by the legislature and by the people through referendum, the legislature needs to give serious consideration to funding indigent legal services to an appropriate level so assessments by the Court like we have been speaking of today

are not necessary. Unfortunately, Wisconsin has fallen behind neighboring states like Minnesota, Michigan, Illinois and Ohio in appropriating funds for indigent legal services. The report from the Access to Justice Study Committee of the State Bar of Wisconsin that I referenced earlier confirms this. No doubt the introduction and hearing on this resolution will restart a much-needed dialogue on indigent funding. Today, however, this committee, and those who testify should focus on the goal of eliminating the assessments that came into existence without legislative approval. The underlying goal of this measure is to put the power of the purse back where it belongs.

Thank you for your consideration. Questions .....

ASSEMBLY COMMITTEE ON ELECTIONS AND CONSTITUTIONAL LAW

TESTIMONY OF ATTORNEY STEVEN LEVINE
IN SUPPORT OF AJR 30
PROHIBITING THE SUPREME COURT OF WISCONSIN
FROM ASSESSING LAWYERS TO PAY FOR CIVIL LEGAL SERVICES

My name is Steve Levine, an attorney residing in Madison, and President of the State Bar of Wisconsin. I am pleased and thankful to be able to testify in favor of Assembly Joint Resolution 30. I do so on my own behalf and not on behalf of the State Bar.

Every lawyer in Wisconsin recognizes the important ethical obligation to offer his or her time and/or money to provide civil legal services for those who cannot afford them. This is an essential moral obligation of all lawyers, which I consider of prime importance. However, there are a number of reasons why the Wisconsin Supreme Court should be prohibited from assessing lawyers to pay for civil legal services for the poor.

A legislative rather than a supreme court power. Nowhere is the Wisconsin Supreme Court authorized to impose an assessment on lawyers to pay the cost of providing civil legal services for the poor. Article 7 of the state constitution contains no express authority authorizing the court to tax or assess lawyers to fund legal services programs. Civil legal services programs are social programs which are within the jurisdiction of the legislature to fund through taxes or assessments. As the more democratic branch of government, the legislature is better able to make findings of fact and weigh the conflicting factors which are relevant to the funding of civil legal services programs. This supreme court assessment usurps legislative power.

A moral rather than a legally enforceable obligation. A Wisconsin lawyer's obligation to do or to fund pro bono legal services has always been considered a voluntary, ethical, moral obligation – not a legally enforceable one. Supreme Court rule 20:6.1 provides: "A lawyer should render public interest legal service." Use of the word "should" rather than "shall" indicates that this obligation is an ethical rather than a legally enforceable one, and the comment to the rule states, "This rule expresses that policy but is not intended to be enforced through disciplinary process." A supreme court assessment converts this ethical obligation into the legal obligation to pay a tax.

Mandatory pro bono unconstitutional. Perhaps the reason why the provision of civil legal services to those who cannot afford has always been considered a voluntary, moral obligation rather than a legally enforceable one is that shortly after Wisconsin became a state, our supreme court decided that a mandatory pro bono obligation was unconstitutional when the legislature sought to impose it. *Please see County of Dane v. Smith* 13 Wis. 654, 658, (*585)(1861) and *Carpenter and another v. County of Dane*, 9 Wis. 249, 252 (*274)(1859). Those cases involved actual pro bono representation rather

than paying an assessment to pay for that representation, but a mandatory pro bono requirement or assessment does not become constitutional merely because the supreme court imposes it rather than the legislature.

Slippery slope. The Wisconsin Supreme Court's assessment on all lawyers to pay the cost of civil legal services may be just the first step in a progression of assessments to pay for other programs. Assume that a group of Wisconsin circuit judges petitioned the court to impose an assessment on lawyers to pay the costs of courthouse security, which the judges complained was not being adequately funded by the legislature or counties. An assessment for this purpose would be a logical progression from the civil legal services assessment and would lead to the next assessment and then others. Unless the court's usurpation of the legislature's prerogative to fund social programs is halted now, each new assessment will become easier for the court to order and more difficult for the legislature to prevent.

The Wisconsin Supreme Court's imposition of an assessment on lawyers to fund civil legal services for those who cannot afford usurps the authority of the Legislature, which is the branch of government authorized by the constitution to tax and assess to fund social programs in this state. That infringement should be corrected by a constitutional amendment.

Respectfully submitted,

Steven Levine
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March 19, 2007

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MEMORANDUM

To: Assembly Committee on Elections and Constitutional Law

From: Atty. John Walsh, Chair
Legislative Oversight Committee
State Bar of Wisconsin

Date: March 22, 2007

Re: State Bar of Wisconsin opposition to AJR 30 (WisTAF Assessment)

The State Bar of Wisconsin opposes Assembly Joint Resolution 30, which would amend the Wisconsin Constitution to prohibit the Wisconsin Supreme Court from assessing a fee to licensed attorneys to fund either civil or criminal legal services for the poor.

The vote two weeks ago by the State Bar's Board of Governors to oppose this proposed constitutional amendment was overwhelming, in fact almost unanimous. In November 2004, when the Board of Governors voted to oppose the creation of the current mandatory WisTAF assessment to fund civil legal services for the poor, that vote was also overwhelming. (Instead, in 2004 the Board of Governors urged the creation of a two-year $50 assessment that members could opt out of if they wished.)

As you can see from these two votes, our opposition to this proposed constitutional amendment has little to do with the merits of the mandatory WisTAF assessment. Rather, our opposition to this proposed constitutional amendment is that this is an inappropriate and unnecessary vehicle for addressing this issue.

There are strong arguments both for and against the current mandatory WisTAF assessment. We believe, however, that the merits or wisdom of the WisTAF assessment are not at issue here. Rather, the issue here is an unnecessary and unwise effort to curtail the authority of the judicial branch of government to regulate the practice of law.

We need not and should not amend the state constitution for the benefit of the State Bar members who currently pay the mandatory WisTAF assessment, including some members of this committee. Further, I find it highly unlikely that, if asked to do so by the Legislature, the people of Wisconsin will vote to relieve lawyers of the obligation to pay for civil legal services for the poor.

Since the founding of our state, the regulation of the practice of law has been vested in the judicial branch of government. Today, Article VII, Section 3 of the Wisconsin Constitution grants to our Supreme Court superintending and administrative authority over all courts in our state. Our state constitution grants the Wisconsin Supreme Court power to adopt measures necessary for the due administration of justice in the state. *State v. Holmes*, 106 Wis. 2d 31, 44,

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315 N.W.2d 703 (1982). The regulation of the practice of law has always been vested in the judicial branch. That authority should be respected as fundamental to our tripartite and republican form of government, in which the judiciary is a separate but fully equal branch of government.

The Supreme Court imposes a number of fees and assessments on licensed attorney in this state. Some assessments – such as those that fund the Office of Lawyer Regulation – are directly related to the regulation of the practice of law. The WisTAF assessment is perhaps most similar to the assessment State Bar members pay to the Wisconsin Lawyers' Fund for Client Protection, which is intended to make whole consumers who are financially harmed by the dishonest conduct of an attorney. The WisTAF assessment, like the Fund for Client Protection, reflects the Supreme Court's recognition of the shared responsibility that all lawyers have to fulfill the moral obligations of the profession.

It is not necessary to amend our state constitution to appease those State Bar members who object to paying the WisTAF assessment. What other group of professionals have been the beneficiary of such favorable treatment by this Legislature?

Several adequate alternatives to amending our state constitution are available to opponents of the mandatory WisTAF assessment. Any State Bar member can petition the Supreme Court for modification or repeal of the assessment. In fact, at the same meeting two weeks ago at which the Board voted to oppose this proposed constitutional amendment, the Board also approved the filing of a petition to the Supreme Court seeking several modifications of the assessment, including allowing Bar members the option of giving money to legal aid organizations other than WisTAF and requiring judges – who are currently exempt – to also pay the assessment.

In addition to petitioning the court directly, any State Bar member, or the State Bar itself, could also choose to fight the WisTAF assessment via litigation. To date, that has not happened.

Finally, under the Supreme Court Rules that govern the State Bar of Wisconsin, any member has the right to initiate a referendum of State Bar membership by filing a petition bearing the signature of 1,000 Bar members. Such a referendum can seek the opinion of the membership on any matter of public policy of concern to the Bar. To date, no opponent of the WisTAF assessment has chosen to seek a referendum of State Bar members either.

Given the entire range of options available to those State Bar members who feel aggrieved by the current WisTAF assessment, it is gross overreaching to seek to amend the state constitution for the benefit of those members.

TESTIMONY ON AJR-30
A. JOHN VOELKER, DIRECTOR OF STATE COURTS
BEFORE THE ASSEMBLY COMMITTEE ON ELECTIONS AND CONSTITUTIONAL LAW
MARCH 22, 2007

Thank you for the opportunity to address the state court system's concerns about Assembly Joint Resolution 30.

This resolution amounts to an unnecessary attempt to undercut the state Constitution's grant of superintending and administrative authority of all courts to the judicial branch. This is obviously a delicate balance between the branches.

The Court concluded that the issue of legal representation was critical to the administration of justice.

As you may know, Wisconsin has a proud tradition of helping some of its poorest citizens find legal representation.

This assistance is not only in the interest of society at large; it's in the interest of the effective administration of justice. This fact has long been recognized by the courts and stakeholders in justice, including lawyers.

Allow me to provide a little historical perspective and bring you up to date.

The Interest of Lawyer Trust Accounts (IOLTA) program was established by the Court in 1986 to help people who otherwise couldn't afford it to have legal representation in civil cases.

For years, the account provided much needed help. But in 2004, when interest rates hit a 45-year low and funding dipped, the Wisconsin Trust Account Foundation (WisTAF) asked the Supreme Court to step in.

WisTAF petitioned the Court in its rulemaking authority to approve a $50 fee from each active lawyer in the state, as well as Supreme Court justices, to help offset the reduced funding.

Without the additional support, many of the state's poorest residents would have been left without legal representation, and therefore without access to justice. Even with the fee, the legal needs of the poor have not been met.

Testimony provided during consideration of WisTAF's petition showed Wisconsin's poorest citizens increasingly lacked access to representation for basic civil legal services in critical areas, such as custody matters, domestic violence, housing, government benefits and health care.

The results of not being able to afford legal representation can be tragic, as individuals attempt to pursue their own rights and remedies without understanding the legal system. In turn, this presents a challenge for the courts in terms of staff time, administrative costs and decreased efficiency.

State and federal courts have affirmed that lawyers are more than just bystanders in a courtroom. As officers of the court, they have an obligation to help the Court ensure the effective administration of justice.

In 1902, the Wisconsin Supreme Court in Green Lake County v. Waupaca County, concluded: "(Lawyers) are admitted to the rank of the bar not only that they may practice their profession on behalf of those who can pay well for their services, but that they may assist the courts in the administration of justice."

WisTAF asked the Supreme Court to use its constitutional authority to approve the petition.

The state Constitution is a principled document that should not be misused as a forum to settle this issue.

Thank you.

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March 21, 2007

To: Assembly Committee on Elections and Constitutional Law

Re: Opposition to AJR 30 and AJR 31

The League of Women Voters of Wisconsin is opposed to AJR 30 and AJR 31 as inappropriate subjects for constitutional action.

In Wisconsin, the Supreme Court by rule requires all practicing attorneys to belong to the State Bar of Wisconsin and pay bar dues. A portion of those bar dues is used to provide legal services to the indigent.

Practicing attorneys must complete thirty hours of continuing legal education in specified time periods and the Bar Association is the venue for much of that legal education. This continuing education requirement, as it does in other licensed professions, provides a level of quality assurance for consumers.

The League has long supported the public defender program in the criminal justice system but there are many other legal issues confronting the poor. The portion of the bar dues going to support legal services to indigents must be viewed as an appropriate expenditure, since surely attorneys understand the importance of quality legal representation, especially for those who have no resources.

The citizens of the state of Wisconsin would not be well served by enactment of AJR 30 and AJR 31.